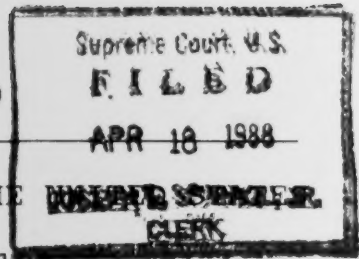


NO. 87-1390



IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

Makah Tribe, et al.,

Petitioners,

v.

State of Washington, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE COURT OF APPEALS FOR  
THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

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- I. THE STATE OF WASHINGTON'S BRIEF IN  
OPPOSITION HIGHLIGHTS BOTH THE  
EXCEPTIONAL IMPORTANCE OF THE ISSUES  
PRESENTED BY THE PETITION AND THE  
EXTENT OF THE COURT OF APPEALS'  
DEVIATION FROM SETTLED §1983  
JURISPRUDENCE.

In response to the Tribes' arguments  
that the Court of Appeals' "known and  
well-delineated rights" holding created a

major exception to the reach of §1983 and, in effect, established a good faith immunity from attorneys' fee claims, the State of Washington argues that the Court of Appeals ruling should be read as limited to cases involving treaty rights to a natural resource and that, so limited, no good faith immunity was recognized. Brief in Opposition at 9-13.

This is not persuasive. The State concedes that the Court of Appeals gave no explicit indication that its holding was limited to Indian treaty rights, Brief in Opposition at 14, and the State offers no explanation as to how the Court of Appeals opinion can be so read or on what basis rights secured by treaties can be treated in a categorically different manner than other rights "secured by the Constitution

and laws."<sup>1</sup> Further, the Court of

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<sup>1</sup> The Court of Appeals did not cite Consolidated Freightways v. Castle, 730 F.2d 1139 (8th Cir. 1984), cert. denied 469 U.S. 834 (1984), upon which the State relies to distinguish treaty rights from other federal rights. That case, involving the general preemptive effect of the commerce clause, bears little resemblance to this Court's recognition in State of Washington v. Washington State Commercial Passenger Fishing Vessel Assoc., 443 U.S. 658 (1979), of the specific federal right "to take fish" secured to the Tribes by the Stevens Treaties. By the same token, White Mountain Apache Tribe v. Williams, 810 F.2d 844 (9th Cir. 1987), cert. denied \_\_\_ U.S. \_\_\_, 105 S. Ct. 940 (1987), concerned implied rights which arose by reason of the general preemptive effect of certain federal statutes regulating Indian timber harvest. Once again, no specific federal right, such as the "right to take fish," was involved.

The State cites no authority to support its argument that §1983 is not available because "the federal right involved here is not found in any language addressed to the states." Brief in Opposition at 11. That the Treaties do not specifically refer to the State is simply a function of timing, not substance: The Stevens Treaties were negotiated and ratified several decades before statehood. Nonetheless, the federal rights secured by the Stevens Treaties are made binding on the State by



Appeals' statement that a §1983 action might lie if the State were to violate these "now known and well-delineated rights," 813 F.2d at 1023, strongly suggests that the court below did intend that good faith immunity from attorneys' fees should be available at least in treaty rights cases.

More importantly, assuming arguendo that it was the Court of Appeals' intention to limit its holding to federal treaty rights, the question becomes: Why, and on what basis, should a special exception be created to the broad reach of §1983 to rights "secured by the Constitution and laws" that is unique to rights secured by federal treaties as

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the supremacy clause. When the State and its officials deprived the Tribes and their members of those specific rights, they became subject to liability under §1983.

opposed to rights secured by statutes or the Constitution. The Tribes have pled, litigated and prevailed on claims that State officials, acting under color of State law, deprived the Tribes and their members of rights that were "sufficiently specific and definite to qualify as enforceable rights under Pennhurst and §1983 ...." Wright v. City of Roanoke Redevelopment and Housing Authority, \_\_\_\_\_ U.S. \_\_\_\_\_, 93 L.Ed.2d 781, 793 (1987). No suggestion is made that the Stevens Treaties can be read to "demonstrate Congressional intent to preclude the remedy of suits under §1983," Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1, 20 (1981). It is only through the establishment of its new "exception" regarding "known and well-delineated rights" that the Court of Appeals was able

to hold the federal treaty rights at issue outside the protective ambit of §1983.<sup>2</sup>

Whether stated as a rule of general application to all §1983 cases, or limited to federal rights secured by treaties, the Court of Appeals' creation of a new exception to the availability of §1983 raises issues of exceptional importance that merit Supreme Court review. Even if limited to treaty right cases, the holding below would substantially emasculate the §1983 remedy for Indian people with respect to an important class of federal rights secured by law. Indeed, Indian people are the one racial minority

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<sup>2</sup> As pointed out in the Petition, the Court of Appeals applied its own newly created test in a manner that is inconsistent with this Court's holding in Passenger Fishing Vessel, that the treaty language at issue was "unambiguous," 443 U.S. at 679, and that the right to a fair share of the runs was "virtually a 'matter decided' by [this Court's] previous holdings." 443 U.S. at 679.

in the United States whose rights are frequently secured by treaty. It is thus painfully apparent that the Court of Appeals' reading of §1983 would discriminate against Indians as a class: by denying attorneys' fees, it places substantial burdens on the successful vindication of treaty rights as compared to other kinds of federal rights recognized by the courts as actionable under §1983. That §1983, a statute enacted to combat such discrimination, should be so read is, the Tribes suggest, obnoxious to the principle of equal rights before the law. Certiorari should be granted to review this discriminatory reading of the statute.

II. THIS CASE PRESENTS IMPORTANT QUESTIONS CONCERNING THE EXTENT TO WHICH ATTORNEYS' FEES ARE MANDATED PURSUANT TO THE HOLDING OF MAHER V. GAGNE, 443 U.S. 122 (1980), FOR SUCCESSFUL CONSTITUTIONAL CLAIMS PENDENT TO THE UNDERLYING FEDERAL RIGHT.

Notwithstanding the Tribes' success on their constitutional claims in United States v. Washington, see Petition at 9-15, 19-20, the State claims that denial of fees by the Court of Appeals was appropriate because the Tribes' Fourteenth Amendment claims "were completely dependent upon the treaty-based claim." Brief in Opposition at 18. This is factually incorrect as to the successful procedural due process claims, and, as to the equal protection and substantive due process claims, the State's arguments underscore the cert-worthy nature of the issues presented by the Petition.

As explained in the Statement of the Case at 12-15, two of the District Court's holdings of constitutional violation concerned procedural due process: First, the Department of Game determination to ban all Indian net fishing on the steelhead runs "did not accord treaty Tribes a hearing in conformity with due process of law ...." Conclusion of Law 42, 384 F. Supp. at 404. Second, with respect to the State's enforcement practices, State seizure, destruction or disposition of "fishing gear and other property of members of the plaintiff Tribes ... without any judicial determination of confiscation or forfeiture is an unlawful deprivation of the rights of said members under the Fourteenth Amendment of the Constitution of the United States and the Treaties...." Conclusion of Law 43, 384

F. Supp. at 404. These successful procedural due process claims stand independent of the allocation issues; they were not challenged or disturbed on appeal and cannot be labelled "insubstantial."

Neither the State nor the court below cited authority for the proposition that a substantive due process or equal protection claim is "insubstantial" if its existence depends in part on confirmation of the underlying federal right that is asserted. As explained in the Petition, the Tribes' substantive due process claims arose because State regulations impermissibly rendered the federal treaty right "nugatory" by regulating the fishery in such a manner that virtually all of the catch, 98 percent in 1974, was taken by non-Indian fisherman. See Passenger Fishing Vessel, 443 U.S. at 676

n.22. The Tribes' right to take fish is a compensable property right. See Menominee Tribe v. United States, 391 U.S. 404, 413 (1968).<sup>3</sup> State action which, inconsistent with the Supremacy Clause, renders the Tribes' property right "nugatory" does not lose its constitutional status simply because it is the State rather than the federal government which nullifies the right.<sup>4</sup>

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<sup>3</sup> In Menominee, this Court stated that the Tribes treaty fishing right was constitutionally protected even though the 1854 treaty at issue did not specifically mention hunting and fishing rights. The Court found that such rights existed based on treaty language that reservation lands were "to be held as Indian lands are held." 391 U.S. 404, 406 (1968). Here, where the rights are explicit, there is no question of their status as constitutionally protected property rights.

<sup>4</sup> The Tribes' claims are analogous to the claims presented in the regulatory taking cases decided by this Court last term. See First Lutheran Church v. Los Angeles County, \_\_\_ U.S. \_\_\_, 96 L.Ed.2d 250 (1987); Nollan v. California Coastal



Similarly, State interference with the paramount federal right, so substantial as to render the property right "nugatory" as the Court of Appeals conceded, does not become constitutional simply because the State attacks the substance of the underlying right. By analogy, if in Nollan v. California Coastal Commission, \_\_\_ U.S. \_\_\_, 97 L.Ed.2d 677 (1987), the State Coastal Commission had argued that the Nollans did not own the property, we assume this Court would have nevertheless found a constitutional violation if the ownership issue were resolved in favor of the Nollans. Likewise, in United States v. Washington, the existence and scope of

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Commission, \_\_\_ U.S. \_\_\_, 97 L.Ed.2d 677 (1987). The important difference is that because the treaty right is paramount to State law under the supremacy clause, no actual "taking" pursuant to State police power authority could occur. For that reason the claim is one of denial of substantive due process, not a taking.

the right were confirmed. The right to take fish was reserved to the Tribes by the Stevens Treaties in 1854; it did not spring into being in 1979 with this Court's decision in Passenger Fishing Vessel. Notwithstanding the State's challenge to the existence and scope of the treaty right, therefore, it was not bootstrapping for the Tribes to raise both treaty and substantive due process claims. These claims go to the center of the United States v. Washington litigation and, together with the district court's specific findings of discrimination and deprivation of due process, support an award of attorneys' fees under Maier v. Gagne, supra.

III. THE TRIBES PLED, LITIGATED AND PREVAILED UPON VALID 42 U.S.C. §1983 CLAIMS WHICH SUPPORT AN AWARD OF ATTORNEYS' FEES.

The State's contention that §1983

"did not play any direct or even indirect part on the proceeding until the renewed motion for attorneys' fees filed in 1980," Brief in Opposition at 8, is both inaccurate and misleading. Although §1983 was not always cited by section number, the substance of the Tribes' claims was that State officials, acting under color of State law, had deprived the Tribes and their members of rights "secured by the Constitution and laws." See Petition at 8-20. That claim is at the heart of §1983. The district court's final pretrial order referred specifically to the jurisdictional counterpart of §1983, 28 U.S.C. §1343(3) and (4).<sup>5</sup> Judge Boldt

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<sup>5</sup> It is true, of course, that there were additional jurisdictional bases for United States v. Washington other than 28 U.S.C. §1343(3). Nevertheless, all parties stipulated to jurisdiction under that statute as well as under 28 U.S.C. §1345 and §1362. At the time of the pretrial order and trial, neither the

concluded, in language parallel to §1983, that each of the Stevens Treaties "secured the Indians' rights, privileges and immunities distinct from those of other citizens," Conclusion of Law 19, 384 F. Supp. at 401, which were violated by the State and by State officials acting under color of State law. See 384 F. Supp. at 401-404, 407, 415.

The Tribes pled, litigated and prevailed on §1983 claims, the case was pending when the §1988 was enacted, and the Tribes are entitled to an award of attorneys' fees under established authority. Neither the constitutional

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State nor the Tribes knew, in advance of the enactment of 42 U.S.C. §1988, that an award of attorneys' fees could potentially turn on the validity of the §1983 claims. The Tribes were in no better position than the State of Washington to anticipate the enactment of §1988. Nevertheless, the treaty and constitutional claims were pushed to a successful conclusion.

claims nor the claims that the treaties established rights "secured by the Constitution and laws" were an afterthought.

### CONCLUSION

The State's brief in opposition demonstrates that the decision below creates a major new exception to the availability of attorneys fees pursuant to §1988, an exception beyond those

recognized by this Court. The Petition  
should therefore be granted.

Dated this 14th day of April, 1988.

Respectfully submitted,

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